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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

IN RE: 23ANDME, INC. CUSTOMER ) Case No.: 3:24-md-03098-EMC  
DATA SECURITY BREACH LITIGATION )  
) **NOTICE OF CORRECTED<sup>1</sup> MOTION**  
) **AND MOTION TO INTERVENE;**  
) **MEMORANDUM IN SUPPORT**  
)  
) Judge: Hon. Edward M. Chen  
) Courtroom: 5, 17th Floor  
) Hearing Date: October 17, 2024  
) Hearing Time: 1:30 p.m.  
)

**NOTICE OF CORRECTED MOTION AND MOTION TO INTERVENE**

To the Clerk of Court and all interested parties:

PLEASE TAKE NOTICE that on October 17, 2024, at 1:30 p.m., or on such other date  
or time as this matter may be heard, in the courtroom of the Honorable Judge Edward M. Chen,

<sup>1</sup> Proposed Intervenor and their Counsel file this “Corrected Motion” in the interest of full transparency (*see infra* at 9) and to correct certain statements made in their original motion and supporting papers after meeting and conferring with Class Counsel.

1 located at 450 Golden Gate Avenue, 17th Floor, Courtroom 5, San Francisco, California 94102,  
2 Intervenor Vivian Gonczi, Howard Packer, and Lance Alligood (collectively, “Intervenor”) will and hereby do, move for an order allowing intervention under Federal Rule of Civil  
3 Procedure Rule 24(a) as a matter of right or, in the alternative, under Rule 24(b) for permissive  
4 intervention, for the purpose of opposing the proposed class settlement before the Court.  
5

6 This Motion is made to protect the rights of claimants actively pursuing individual  
7 arbitrations against 23andMe pursuant to a contract, specifically 23andMe’s own Terms of  
8 Service, which require individual arbitration as the exclusive means by which to resolve any and  
9 all disputes with the company. The proposed Intervenor are among approximately 4,966  
10 claimants who are represented by the undersigned counsel and who previously provided notices  
11 to 23andMe of their respective individual claims and have initiated their individual arbitrations  
12 against the company regarding the compromise of their genetic data via the 23andMe data breach  
13 at issue before this Court (collectively, “Claimants”). These Claimants have ongoing arbitration  
14 proceedings based on specific damages arising from the exposure of their highly sensitive genetic  
15 information by 23andMe. The class settlement, as currently proposed, requests extraordinary and  
16 unprecedented relief in the form of an injunction of thousands of pending arbitrations, which  
17 would effectively extinguish Intervenor and Claimants’ private contractual rights to pursue  
18 arbitration where these Claimants seek different relief than that afforded under the Class  
19 Settlement for the distinct and long-lasting harms they have suffered and will continue to suffer  
20 because of 23andMe’s data breach. The Motion will be heard on this Notice of Motion and  
21 Memorandum in Support below, as well as other filings and arguments that may be submitted  
22 and the Proposed Order filed herewith.  
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1 Dated: October 1, 2024

Respectfully submitted,

2 /s/ Alex R. Straus

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**MEMORANDUM OF POINTS AND AUTHORITIES****INTRODUCTION**

This Motion to Intervene is filed on behalf of Intervenors Vivian Gonczi, Howard Packer, and Lance Alligood, who are among approximately 5,000 Claimants represented by the undersigned counsel and who are currently engaged in arbitration proceedings against 23andMe pending before JAMS. Intervenors and similarly situated Claimants were directly affected by the April 2023 data breach caused by 23andMe's inadequate data security policies and practices, which allowed unidentified third parties to download and sell extraordinarily sensitive personally identifiable information about their genomics, DNA profiles, ancestries and ethnicities on the Dark Web. The data of nearly one million 23andMe users with alleged Jewish ancestry, including their home addresses, was sold by cyber criminals on hacking platforms.<sup>2</sup> The exposure of this data, is particularly dangerous given the current volatile political climate, including the war in the Middle East.<sup>3</sup>

Intervenors assert that the proposed class action settlement seeks extraordinary and unprecedented relief. It seeks to strip away contractual rights between private parties to the benefit of 23andMe and detriment of the Claimants and Class Members. At the time they signed up for 23andMe's services, 23andMe forced these Claimants and Class Members to surrender their rights to sue in court over any and all disputes and controversies and instead required them to pursue their claims through private arbitration proceedings. When 23andMe instituted this

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<sup>2</sup> Oldfield, Ariella, *23andMe faces lawsuit as hackers sell information on users with Jewish heritage*, THE TIMES OF ISRAEL, Jan. 31, 2024, available at <https://www.timesofisrael.com/23andme-faces-lawsuit-as-hackers-sell-information-on-users-with-jewish-heritage/> (last accessed Sept. 25, 2024).

<sup>3</sup> Antisemitic incidents increased by 36% in the United States in 2022 with more than 3,500 incidents, many of which were assaults targeting Jewish people. Sganga, Nicole, *Highest number of antisemitic incidents since 1979 recorded last year, Anti-Defamation League finds*, CBS NEWS, Mar. 23, 2023, available at <https://www.cbsnews.com/news/antisemitic-incidents-most-since-1979-anti-defamation-league-annual-report/> (last accessed Sept. 25, 2024).

1 adhesive contract and arbitration requirement, it hoped it would be immune from lawsuits and  
2 liability, fully believing no consumer would ever waste their time or money to actually go through  
3 the arbitration process. 23andMe was wrong. In the wake of the data breach, thousands of  
4 Claimants sought to enforce their rights through 23andMe's own arbitration process. Faced with  
5 the reality that 23andMe's own arbitration process no longer benefitted 23andMe, 23andMe now  
6 seeks to avoid the very dispute resolution process it created. Essentially, 23andMe seeks to play  
7 a game of "heads I win, tails you lose." In other words, if 23andMe thought it could avoid  
8 liability through the arbitration process, there is no doubt 23andMe would seek to invoke that  
9 arbitration clause to kill a lawsuit. But now that the arbitration clause no longer serves to benefit  
10 23andMe, it has completely disavowed that clause and rushed to reach a class wide settlement  
11 that could impair the contractual rights of Claimants and Class Members. The proposed  
12 settlement before the Court threatens to enjoin class members, including Intervenors and  
13 Claimants, from pursuing ongoing private arbitrations unless and until they affirmatively opt out  
14 within a narrow timeframe set by the settlement. There is no basis to enjoin these ongoing  
15 arbitrations. Moreover, the opt-out provisions, as outlined in paragraphs 73(h) and 80-88 of the  
16 Settlement Agreement, unfairly burden Claimants by requiring strict compliance with a  
17 convoluted opt-out process clearly geared towards making it difficult for Claimants and Class  
18 Members to opt out and pursue individual arbitration. Furthermore, Claimants seek relief that  
19 different than the relief being afforded under the proposed settlement, including, for example,  
20 the incorporation of logging and monitoring programs and requiring annual SOC 2 Type 2  
21 assessments to ensure long-term protection and independent oversight of 23andMe's data  
22 security practices.

23  
24 This Motion is brought under Federal Rule of Civil Procedure 24(a) for intervention as a  
25 matter of right, as Intervenors and Claimants have a protectable interest that will be impaired if  
26 the proposed class settlement is approved without their participation. Alternatively, Intervenors  
27 seek permissive intervention under Rule 24(b), as their claims share common legal and factual  
28

questions with the class action yet focus on the improperly requested injunction of their individual arbitrations through which they seek different relief to address the unique harm caused by the genetic data breach. Pursuant to this Motion, Intervenor seek leave to file the Opposition to Proposed Injunction and Opt-Out Procedures Sought by Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, attached hereto as Exhibit A.

### **STATEMENT OF RELEVANT FACTS**

#### **A. Status of the Class Action Litigation**

In October 2023, 23andMe publicly disclosed that a significant data breach occurred, compromising millions of users' personal and genetic data. Following this announcement, over forty (40) class action lawsuits were filed, all alleging that 23andMe failed to adequately protect user data and violated various consumer protection laws. These lawsuits were consolidated into a Multidistrict Litigation (MDL) in the Northern District of California, overseen by the Honorable Edward M. Chen. On September 12, 2024, the MDL parties reached a proposed settlement which includes a \$30 million fund to compensate affected users. While the proposed settlement provides for general monetary compensation, which Intervenor do not take issue with, it requests extraordinary and unprecedented relief by asking this Court to strip away contractual rights between private parties by way of an injunction of thousands of pending private arbitrations. Specifically, ¶ 73.h) of the proposed settlement agreement requests:

“preliminary injunction of all Settlement Class Members and their representatives from filing, commencing, prosecuting, maintaining, intervening in, conducting, continuing, or participating in any other lawsuit or administrative, regulatory, arbitration or other proceeding based on the Released Claims, unless and until they personally submit a timely request for individual exclusion pursuant to the Settlement Agreement after receiving Notice.”

Plaintiff's Proposed Settlement, ECF No. 103-2, ¶ 73(h). Further, Intervenor intend to seek different non-monetary relief than that provided under the Settlement to address the long-term

consequences associated with the exposure of genetic data, a central issue for Intervenor and Claimants.

Notably, the request for a preliminary injunction has drawn the attention of the Court, prompting the Honorable Judge Chen to question of whether “either party discussed this requested preliminary injunction with the attorneys representing the plaintiffs in the state court cases or the claimants in the arbitration proceedings?” Order Re Supp. Briefing and/or Evidence, ECF No. 111, ¶ P. Intervenor and Claimants submit this Motion to advise the Court they unequivocally oppose the requested preliminary injunction.

### **B. Milberg’s Role in the Class Action Proceedings**

The undersigned law firm (Milberg Coleman Bryson Phillips Grossman PLLC (“Milberg”)) filed four (4) class action complaints as local counsel for other law firms related to the 23andMe data incident that were ultimately consolidated as part of these MDL proceedings. *See J.S. et al. v. 23andMe, Inc.*, No. 23-cv-05234, ECF No. 1 (filed 10.12.2023), *Greenberg v. 23andMe, Inc.*, No. 23-cv-5302, ECF No. 1 (filed 10.17.2023); *Hoffman et al. v. 23andMe, Inc.*, No. 23-cv-05332, ECF No. 1 (filed 10.19.2023); *Dube v. 23andMe, Inc.*, No. 23-cv-5768, ECF No. 1 (filed 11.9.2023). Specifically, Milberg associate John J. Nelson—one of approximately 120 lawyers at the firm—served in a purely local counsel capacity in these proceedings for various out of state law firms. Several of these clients for which Milberg served as local counsel ultimately approved the settlement before the Court. Mr. Nelson may have received emails from Class Counsel about the proposed settlement, including the terms now complained of (i.e., the injunction and opt out provisions) but he was not substantively involved in the settlement discussions and did not advise any of the Plaintiffs to approve the settlement. Mr. Nelson has now withdrawn from his limited role as local counsel in these proceedings. Milberg files this corrected Motion in the interest of transparency, so the Court is aware that Milberg had a limited role in the class action proceedings.

1 While Class Counsel and/or 23andMe may contend the Milberg law firm tacitly “signed  
2 off” on the proposed settlement and its terms by serving as local counsel in the proceedings and  
3 not previously voicing an objection to the proposed settlement, Milberg respectfully disagrees  
4 with this contention given its limited role in the proceedings. In any event, and as the Court  
5 knows, the Court has an independent obligation under Rule 23 to review whether the proposed  
6 terms are fair and reasonable.

7 **C. Status of the Mass Arbitration Proceedings**

8 Beginning in December 2023, the undersigned counsel sent 23andMe notices of dispute  
9 on behalf of thousands of Claimants regarding its April 2023 data breach. And in February 2024,  
10 one hundred (100) Claimants filed individual demands for arbitration of their claims with JAMS  
11 in accord with 23andMe’s governing Terms of Service. Claimants and 23andMe paid their  
12 respective filing fees, which amounted to hundreds of thousands of dollars, to JAMS and  
13 confirmed their readiness to proceed. JAMS is currently in the process of assigning arbitrators to  
14 preside over these individual matters. The next step will be for those arbitrators to schedule  
15 preliminary hearings and enter scheduling orders. Notices of dispute were sent to 23andMe on  
16 behalf of thousands of additional Claimants throughout April and May 2024. In July 2024, an  
17 additional 4,866 Claimants submitted individual demands for arbitration of their claims to JAMS  
18 where they remain pending.

19  
20 Intervenor and Claimants’ claims seek relief for 23andMe’s negligence in safeguarding  
21 their highly sensitive personal and genetic data, and the long-term risks occasioned by the breach,  
22 including potential misuse of genetic information and future discrimination. Significantly, the  
23 specific relief requested by Intervenor and Claimants in their demands is different than the  
24 remedies included in the proposed class action settlement. Claimants intend to seek significantly  
25 more money through the arbitration proceedings than they will likely recover by simply  
26 participating as absent class members in this Settlement. Moreover, they also seek different non-  
27 monetary relief than that provided for under the Settlement, including, for example, logging and  
28

1 monitoring programs, ongoing independent oversight through annual SOC 2 Type 2 assessments,  
2 and additional data security protocols to ensure continuous protection of genetic data. Claimants  
3 seek these remedies to address the unique harm caused by exposure of their genetic information.

4 **D. The Settlement and the Burdensome Opt-Out Process**

5 The proposed class settlement improperly includes a preliminary injunction provision  
6 which, if approved, would enjoin *all* class members—including Intervenor and Claimants who  
7 are currently pursuing arbitration—from filing, commencing, or participating in any arbitration  
8 or related proceedings unless they submit a timely request for exclusion. This injunction would  
9 effectively bar Intervenor and Claimants from continuing to pursue their claims in arbitration  
10 unless and until they go through the onerous opt-out procedure proposed under the class  
11 settlement. Plaintiff’s Proposed Settlement, ECF No. 103-2, ¶ 73(h). The proposed opt-out  
12 procedures unreasonably require any class members wanting to opt out of the class to submit a  
13 written request that must:

- 14 • Include the case name of the Litigation: In Re: 23andMe, Inc.,  
15 Customer Data Security Breach Litigation, Case No. 24-md-03098-  
16 EMC;
- 17 • Identify the name and current email and mailing addresses of the  
18 Person seeking exclusion from the Settlement;
- 19 • Identify the 23andMe username or email associated with the  
20 23andMe account for the Person seeking exclusion from the  
21 Settlement;
- 22 • Be individually signed by the Person seeking exclusion using wet-  
23 ink signature, DocuSign, or other similar process for transmitting  
24 authenticated digital signatures;
- 25 • Include an attestation clearly indicating the Person’s intent (to be  
26 determined by the Notice and Claims Administrator) to be excluded  
27 from the Settlement;
- 28 • Attest that the Person seeking exclusion had a 23andMe user  
account as of August 11, 2023.

1 Plaintiff's Proposed Settlement, ECF No. 103-2, ¶ 81. Even opt-out requests submitted  
 2 electronically via the claims portal require jumping through an additional hoop by verifying the  
 3 request within three business days of the Opt-Out Deadline, which is clearly intended to void  
 4 otherwise valid opt-out requests. *Id.* at ¶ 82.

5 Significantly, the proposed opt-out procedures do not allow for the undersigned counsel  
 6 to opt their own clients (i.e., Intervenor and Claimants) out of the class en masse or otherwise,  
 7 despite the fact that Intervenor and Claimants are represented by counsel and, as 23andMe has  
 8 full knowledge, have expressed their intent to continue their individual arbitrations. Indeed, the  
 9 settlement agreement expressly states that any such requests seeking exclusion on behalf of more  
 10 than one individual shall be deemed invalid. *Id.* at ¶ 83.

11 Additionally, as discussed above, Intervenor and Claimants intend to seek monetary and  
 12 non-monetary remedies that are different than the remedies provided for under the proposed class  
 13 settlement. This fact also militates in favor of preserving the arbitration claimants' ability to  
 14 pursue the specifically tailored relief sought in the ongoing arbitration proceedings.

### 15 ARGUMENT

#### 16 **A. The Proposed Intervenor Satisfy the Requirements of Rule 24(a) and Should** 17 **Be Allowed to Intervene as a Matter of Right.**

18 A court must allow intervention to anyone who "claims an interest relating to the property  
 19 or transaction that is the subject of the action and is so situated that disposing of the action may  
 20 as a practical matter impair or impede the movant's ability to protect its interest, unless existing  
 21 parties adequately represent that interest." Fed. R. Civ. P. 24(a). In order to intervene as a matter  
 22 of right, a prospective intervenor must show: (1) the motion is timely, (2) the applicant has a  
 23 significantly protectable interest relating to the property or transaction that is the subject of the  
 24 action, (3) the disposition of the action may impair or impede the applicant's ability to protect  
 25 that interest, and (4) the existing parties do not adequately represent the applicant's interest.  
 26 *United States v. Oregon*, 839 F.2d 635, 637 (9th Cir. 1988). Courts interpret the requirements for  
 27

1 intervention broadly, favoring intervention where possible. *Prete v. Bradbury*, 438 F.3d 949, 954  
2 (9th Cir. 2006) (internal quotation marks omitted).

### 3 **1. The Application to Intervene Is Timely**

4 Timeliness is the “threshold requirement” for a party seeking to intervene under Rule  
5 24(a). *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990). Three factors determine  
6 whether a motion is timely: “(1) the stage of the proceeding at which an applicant seeks to  
7 intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay.”  
8 *County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986). Here, the proposed  
9 settlement has only now reached the stage where the MDL parties have agreed on terms, and the  
10 plaintiffs having moved this Court for conditional certification of the settlement class and  
11 preliminary approval. ECF No. 103-1. The Motion to Intervene, therefore, is at this point timely  
12 and appropriate. Courts routinely find intervention in response to a proposed settlement to be  
13 timely when intervenors act promptly upon learning a proposed settlement may adversely affect  
14 their interests. *E.g., Glass v. UBS Fin. Servs., Inc.*, No. 06-4068, 2007 WL 474936, at \*3 (N.D.  
15 Cal. Jan. 17, 2007), *aff’d*, 331 F. App’x 452 (9th Cir. 2009). Timeliness is generally measured  
16 from the point when the proposed intervenor receives notice the settlement terms may be contrary  
17 to their interests, not from the beginning of the litigation. *Id.*

18  
19 In this case, Intervenors moved to intervene shortly after the proposed settlement was  
20 publicly filed and it was revealed that Claimants’ private arbitration proceedings could  
21 potentially be enjoined and they would have to undergo a burdensome opt-out procedure.  
22 Intervenors also learned that the relief afforded under the Settlement does not encompass what  
23 they seek in private arbitration. The motion to intervene was filed promptly on September 26,  
24 2024, only fourteen days after the settlement became public, well within the time frame allowed  
25 for intervention (with no undue delay) and prior to any related hearings or issuance of notice to  
26 the putative class. It is important to remember the “*most important circumstance* relating to  
27 timeliness is that the [proposed intervenors] sought to intervene as soon as it became clear that  
28

1 [their] interests would no longer be protected by the parties in this case.” *Cameron v. EMW*  
2 *Women’s Surgical Ctr., P.S.C.*, 595 U.S. 267, 279-80, 142 S. Ct. 1002, 212 L.Ed.2d 114 (2022)  
3 (cleaned up and emphasis added). That “most important” consideration strongly weighs in favor  
4 of intervention here.

5 The second factor asks whether intervention will prejudice the existing parties. Prejudice  
6 occurs when intervention would expose a negotiated settlement to contrary authority, delay the  
7 relief being sought, or compromise settlements reached after extensive negotiations. *Glass*, 2007  
8 WL 474936, at \*4-5; *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir. 1978). *Day v.*  
9 *Apoliona*, 505 F.3d 963, 965 (9th Cir. 2007) (although the State of Hawaii could have sought  
10 intervention at any time during two years of proceedings, its motion did not cause prejudice to  
11 plaintiffs). However, when potential intervenors act as soon as they have notice that a proposed  
12 settlement may be contrary to their interests, as Intervenors did here, courts generally find no  
13 prejudice. *Carpenter v. County of Elko*, 298 F.3d 1122, 1125 (9th Cir. 2002) (“[T]he interveners  
14 acted promptly after they had notice that the government may not have adequately represented  
15 their interests in negotiating the settlement[.]”); *Day*, 505 F.3d at 965 (“A would-be intervenor’s  
16 delay in joining the proceedings is excusable when the intervenor does not know or have reason  
17 to know that his interests might be adversely affected by the outcome of litigation.”).

18 Here, there is no prejudice to the existing parties because the Intervenors acted as soon as  
19 they had notice to promptly protect their rights. Conversely, the proposed settlement—if  
20 approved without intervention—threatens to extinguish Intervenors and Claimants’ ability to  
21 continue pursuing their arbitrations where they seek relief not encompassed by the proposed  
22 settlement. The proposed settlement purports to resolve claims on behalf of *all* affected users.  
23 ECF No. 103-1, p. 8. But the proposed class settlement places an undue burden on the Intervenors  
24 and Claimants, effectively barring them from pursuing their individual arbitrations as required  
25 under 23andMe’s Terms of Service and, by extension, prevents them from seeking relief that  
26 they could not obtain if they simply participated in the class settlement as an absent class member.  
27

1 Intervention will not delay or disrupt the current settlement proceedings. Intervenor do  
2 not seek to derail the MDL settlement for those who wish to participate in it. Rather, they seek  
3 to ensure their interests in arbitration and, by extension, the relief they seek in arbitration, are  
4 fully represented and protected if their claims are encompassed by the proposed settlement.  
5 Therefore, allowing intervention will not unduly prejudice the existing parties or cause  
6 significant delays.

7 The third factor—the reason for and length of any delay—also indicates in favor of  
8 timeliness. As discussed above, this motion was filed shortly after the settlement terms were  
9 made public on September 12, 2024. The Intervenor acted promptly, filing this motion within  
10 two weeks of learning about the class settlement and its terms. There was no undue delay in  
11 bringing this Motion and the Intervenor have moved swiftly to protect their interests.

12 Courts acknowledge that, when settlement negotiations have been conducted  
13 confidentially, potential intervenors lack notice that their interests are unprotected until the  
14 settlement terms are disclosed. *E.g., Carpenter*, 298 F.3d at 1125 (“[T]he mediation proceedings  
15 had been conducted under an order of confidentiality and the settlement negotiations were not  
16 conducted in open court. By entering into confidential settlement discussions, the government  
17 does not give notice that it may not be adequately representing the interests of any group of  
18 citizens.”). Here, the Intervenor obviously could not take any action until the terms of the  
19 proposed settlement were publicly filed and they did so within two weeks of that filing. The  
20 Intervenor have therefore moved to intervene at the earliest possible moment.

21 In sum, this Motion is timely under the standards established by the Ninth Circuit. The  
22 proposed Intervenor acted promptly after the terms of the proposed class settlement became  
23 public, and their intervention will not prejudice the existing parties or disrupt the settlement  
24 process. Therefore, the timeliness requirement for intervention is satisfied.

25  
26 **2. The Proposed Intervenor Have the Requisite Interest in the Subject**  
27 **Matter of This Case**

1 The Intervenor has a significant and legally protectable interest in the subject matter of  
2 this case. Under Rule 24(a)(2), intervention must be allowed upon demonstration of an interest  
3 in the underlying litigation that is “significantly protectable” and directly affected by the outcome  
4 of the case. A party has a sufficient interest for intervention purposes if it will suffer a practical  
5 impairment of its interests as a result of the pending litigation. *California ex rel. Lockyer v.*  
6 *United States*, 450 F.3d 436, 441 (9th Cir. 2006).

7 “An applicant has a ‘significant protectable interest’ in an action if (1) it asserts an interest  
8 that is protected under some law, and (2) there is a ‘relationship’ between its legally protected  
9 interest and the plaintiff’s claims.” *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441  
10 (9th Cir. 2006). Here, the arbitration claimant’s rights are directly protected under privacy and  
11 contract laws, as they seek specific relief for the exposure of their sensitive genetic data. These  
12 claimants have a direct and substantial interest in ensuring that the proposed class settlement does  
13 not hinder their ability to pursue the specific remedies they are entitled to under arbitration.

14 Here, Intervenor and Claimants have a direct and substantial interest in ensuring the  
15 proposed class settlement does not extinguish their ability to pursue their pending individual  
16 arbitrations before JAMS or to seek the specific relief discussed above through arbitration. If the  
17 class settlement is approved in its current form, Paragraph 73(h) will prevent *all* class members—  
18 including Intervenor and Claimants—from filing or continuing arbitration proceedings unless  
19 they individually comply with a cumbersome opt out procedure within a narrow timeframe. This  
20 provision directly threatens Intervenor’s and Claimants’ ongoing claims and right to pursue  
21 arbitration and, by extension, the ability to obtain both monetary and non-monetary relief they  
22 could otherwise not obtain if they simply participated as an absent class member in the proposed  
23 settlement.

24 Courts consistently determine Rule 24(a)(2) should be broadly construed in favor of  
25 intervention. *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002). To intervene  
26 as of right, the proposed intervenors must show they have a protectable interest that may be  
27

1 impaired by the litigation. In *Smith v. Los Angeles Unified Sch. Dist.*, the court recognized that  
 2 denying intervention could impair the ability of a sub-class to safeguard their interest, particularly  
 3 where their rights were threatened by the policies and agreements formed within the class action  
 4 framework. *Smith v. Los Angeles Unified Sch. Dist.*, 830 F.3d 843, 863 (9th Cir. 2016) (holding  
 5 that denying intervention would impair a subclass' ability to protect its interest, particularly  
 6 where the class action framework threatened the rights of the subclass to challenge district-wide  
 7 policies)). Similarly, here, the proposed settlement's injunction threatens the arbitration  
 8 claimants' ability to obtain they could otherwise not obtain if they simply participated as an  
 9 absent class member in the proposed settlement.

10 In sum, the Intervenor's identify a unique, protectable interest in pursuing arbitration  
 11 which will be impaired if the proposed class settlement is approved in their absence. By enjoining  
 12 all arbitrations, the settlement risks leaving Intervenor's and Claimants without the opportunity to  
 13 proceed with their respective arbitrations or obtain the specific relief they seek. This substantial  
 14 impairment justifies intervention as a matter of right under Rule 24.

### 15 16 **3. Disposition of the Case Will, as a Practical Matter, Substantially Impair or Impede Proposed Intervenor's Interests.**

17 A proposed intervenor's interests are impaired "[i]f an absentee would be substantially  
 18 affected in a practical sense by the determination made in an action." *Southwest Ctr. for*  
 19 *Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (citing advisory committee's  
 20 notes). The proposed class settlement substantially affects the Intervenor's interests because it  
 21 threatens to extinguish their private contractual rights, including the ability to pursue their  
 22 pending arbitrations and the different monetary and non-monetary relief sought through  
 23 arbitration.  
 24

25 Intervenor's and Claimants have already initiated arbitration proceedings against  
 26 23andMe (spending hundreds of thousands of dollars in the process), seeking relief they could  
 27 otherwise not obtain if they simply participated as an absent class member in the proposed  
 28

1 settlement. Significant time and money has been spent preparing, filing, and pursuing their  
2 demands in arbitration. Claimants believe they stand to recover far more monetarily through  
3 private arbitration than by participating as absent class members in the proposed settlement  
4 before the Court. Moreover, the non-monetary relief they seek is different than what they could  
5 obtain if they simply participated as an absent class member. For example, the arbitration  
6 demands the implementation of logging and monitoring programs, which are essential for real-  
7 time oversight of data security and detection of potential future breaches. Furthermore, the  
8 arbitration calls for a third-party assessor to conduct SOC 2 Type 2 assessments on an annual  
9 basis to independently evaluate 23andMe's compliance with the terms of any award.

10 Intervenor and Claimants cannot obtain the relief they seek through the proposed class  
11 settlement. Plaintiff's Proposed Settlement, ECF No. 103-2, ¶¶ 70-72. Even though it includes  
12 measures such as multi-factor authentication, annual audits, and password protection, these  
13 measures (while positive) are different than the measures Claimants and Intervenor intend to  
14 pursue at arbitration, including, for example, SOC 2 Type 2 assessments, which the arbitration  
15 claimants believe are critical for ensuring 23andMe maintains robust data protection protocols  
16 over time. Additionally, Intervenor and Claimants intend to seek ongoing third-party validation  
17 of data deletion and secure handling of genetic information. Intervenor and Claimants cannot  
18 obtain this relief if they participate as absent class members in the proposed settlement.

19  
20 If the proposed class settlement is approved in its current form, it would have far reaching  
21 implications. Essentially, Parties could strip away private contractual rights when they no longer  
22 suit them under the guise of the All Writs Act by way of an injunction that prevents class  
23 members, including Intervenor and Claimants, from pursuing their ongoing private arbitration  
24 proceedings unless and until they jump through various hoops such as the onerous opt-out  
25 procedures set forth in the Settlement Agreement. Settlement Agreement, Paragraph, ¶ 73(h).  
26 This provision directly threatens Intervenor and Claimants' ability to obtain the different  
27 monetary and non-monetary relief they seek.

1 The opt-out process is not straightforward and imposes unnecessary burdens on class  
2 members, particularly the nearly 5,000 arbitration claimants. It requires claimants to submit a  
3 variety of detailed personal information—including current and past email addresses, 23andMe  
4 account details, and a signed attestation—all within a narrow timeframe. Even after class  
5 members opt out, they have to then verify their opt-out, essentially requiring class members to  
6 opt out of the settlement twice. These stringent requirements, combined with the demand for a  
7 personal signature, create significant obstacles, making it difficult for claimants to opt out.

8 This process seems tailored to suppress the impact and voice of the arbitration claimants  
9 by making it impractical for many to meet the complex and time-sensitive requirements. The  
10 burdensome opt-out process increases the likelihood that many will inadvertently lose their right  
11 to pursue arbitration, including a greater monetary recovery and different non-monetary relief  
12 than that which is provided for under the proposed settlement.

13 In sum, the proposed class settlement seeks to completely bar Intervenor's pending  
14 arbitrations and prevent them from pursuing relief that is different than what they would obtain  
15 if they simply participated as an absent class member. The potential loss of their right to pursue  
16 an ongoing arbitration, along with the opportunity to obtain different relief that Intervenor's  
17 believe will directly address the exposure of their sensitive genetic data, constitutes a significant  
18 impairment of their protectable interests. As such, the approval of the class settlement, without  
19 intervention, may substantially impair or impede the Intervenor's ability to safeguard their rights.  
20 This unquestionable risk to their interests makes intervention necessary under Rule 24(a)(2).

21  
22 **4. Proposed Intervenor's Are Inadequately Represented by Existing**  
23 **Parties**

24 To determine whether representation is adequate, courts consider: (1) whether a party  
25 before the court will make the same arguments the prospective intervenor would; (2) whether the  
26 present party is capable and willing to make those same arguments; and (3) whether the  
27 intervenor would offer necessary elements to the proceedings that other parties would neglect.

1 *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986). Although the  
2 burden is on the proposed intervenors to show that representation is inadequate, this burden is  
3 minimal and may be satisfied by a showing that representation of their interests by parties  
4 presently before the court “may be” inadequate. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th  
5 Cir.2003). The Intervenor focus on preserving their right to continue their respective arbitration  
6 proceedings and to seek specific, different relief through arbitration, as opposed to that which is  
7 being offered by the class settlement. The Intervenor and Claimants already initiated arbitration  
8 proceedings and submitted their arbitration demands to JAMS months before the class settlement  
9 was presented to the Court. Their primary interest lies in ensuring they have an unimpaired  
10 opportunity to continue pursuing their arbitrations and seek the relief to which they believe they  
11 are entitled under the circumstances. At bottom, Intervenor and Claimants simply cannot obtain  
12 the relief they seek through the proposed class settlement. The Intervenor’s interests are therefore  
13 unlikely to be fully represented by the class representatives who are seeking different relief (both  
14 monetary and non-monetary) in the class proceedings. Moreover, the proposed settlement  
15 extinguishes for all class members, including the Intervenor, all rights to seek or to continue  
16 arbitration unless they strictly comply with an opt-out process that is clearly designed to  
17 discourage participation and prevent opting out. By requiring detailed personal information,  
18 multiple account details, and personal signature within a narrow timeframe, the process imposes  
19 unnecessary hurdles. These complex requirements make it difficult for claimants to opt out,  
20 effectively depriving them of their contractual right to arbitrate and steering them into a proposed  
21 settlement that affords different relief than what they would seek through arbitration. This  
22 provision directly conflicts with the Intervenor’s interests, as they seek to continue their  
23 arbitrations in pursuit of different relief afforded under the proposed class settlement. The tension  
24 between the different relief sought by the MDL class representatives and the Intervenor  
25 demonstrates why the Intervenor’s interests are not adequately represented by the existing MDL  
26 parties.  
27

1 The Intervenors' distinct interests in obtaining different relief through arbitration cannot  
2 be adequately represented by the MDL class, justifying intervention under Rule 24(a)(2).

3 **B. Alternatively, Proposed Intervenors Should Be Entitled to Permissive Intervention**

4 Even if the Court finds that intervention as of right is not warranted, the proposed  
5 Intervenors should be granted permissive intervention under Rule 24(b). Permissive intervention  
6 is appropriate when the applicant's claim shares a common question of law or fact with the main  
7 action and will not unduly delay or prejudice the adjudication of the original parties' rights. *Id.*  
8 Here, both the class members and Intervenors seek relief for 23andMe's failure to protect  
9 sensitive personal and genetic information, making the legal and factual issues common. Courts  
10 regularly allow permissive intervention when the intervenor provides a unique perspective not  
11 fully represented by existing parties. *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326,  
12 1329 (9th Cir. 1977). The Intervenors' concerns regarding the continued pursuit of individual  
13 arbitrations and the long-term risks of genetic data exposure, including potential misuse and  
14 discrimination, offer a valuable perspective that complements the class action and may not  
15 otherwise be presented to the Court.  
16

17 Permissive intervention will not cause undue delay or prejudice. The Intervenors seek  
18 only to protect their right to pursue individualized relief through arbitration, without derailing  
19 the settlement for other class members. Their intervention ensures their distinct interests are  
20 safeguarded, particularly when they seek different relief than that which is afforded under the  
21 proposed class settlement.

22 Permissive intervention should be granted as the Intervenors provide necessary elements  
23 to the proceedings without impeding the overall settlement.

24 **CONCLUSION**

25 The Intervenors have a protectable interest in the subject matter of this case and meet the  
26 four elements for intervention as of right under Rule 24(a): the motion is timely, they have a  
27

1 direct interest in the case, that interest would be impaired if intervention is denied, and the  
2 existing parties do not adequately represent their interests.

3 For these reasons, the Court should grant the Intervenor's motion to intervene and grant  
4 them leave to file the Opposition to Proposed Injunction and Opt-Out Procedures Sought by  
5 Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, attached hereto as  
6 Exhibit A. A Proposed Order granting this Motion is attached hereto as Exhibit B.  
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1 Dated: October 1, 2024.

Respectfully submitted,

2 /s/ Alex R. Straus

Alex R. Straus (SBN 321366)

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**CERTIFICATE OF SERVICE**

I, Alex R. Straus, an attorney, hereby certify that on October 1, 2024, I caused a true and correct copy of the foregoing document to be filed and served electronically via the Court's CM/ECF system.

/s/ Alex R. Straus

Alex R. Straus